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ALEXANDER L. STEVENS,
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In the Supreme Court of the United States

OCTOBER TERM, 1983

UNITED PARCEL SERVICE, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS
BOARD IN OPPOSITION

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QUESTION PRESENTED

Whether the Board properly exercised its discretion in refusing to defer to grievance determinations that did not consider or decide the unfair labor practice issue presented to the Board.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statute involved	2
Statement	2
Argument	10
Conclusion	17

TABLE OF AUTHORITIES

Cases:

<i>Adickes v. Kress & Co.</i> , 398 U.S. 144	16
<i>Alexander v. Gardner-Denver Co.</i> , 415 U.S. 36.....	11
<i>Behring International, Inc. v. NLRB</i> , 675 F.2d 83, vacated and remanded, No. 82-438 (June 20, 1983), enforced after remand, 714 F.2d 291.....	9
<i>Carey v. Westinghouse Electric Corp.</i> , 375 U.S. 261	10, 15, 16
<i>Detroit Edison Co. v. NLRB</i> , 440 U.S. 301	16
<i>Electronic Reproduction Service Corp.</i> , 213 N.L.R.B. 758	14-15
<i>Liquor Salesmen's Union Local 2 v. NLRB</i> , 664 F.2d 318	15
<i>NLRB v. Acme Industrial Co.</i> , 385 U.S. 432	10, 16
<i>NLRB v. Al Bryant, Inc.</i> , 711 F.2d 543, petition for cert. pending, No. 83-446	13
<i>NLRB v. Blackstone Co.</i> , 685 F.2d 102, vacated and remanded, No. 82-1105 (June 20, 1983), enforced after remand, No. 81-3132 (3d Cir. Sept. 7, 1983)	9
<i>NLRB v. General Warehouse Corp.</i> , 643 F.2d 965....	13
<i>NLRB v. Magnetics International, Inc.</i> , 699 F.2d 806	12, 15
<i>NLRB v. Motor Convoy, Inc.</i> , 673 F.2d 734	13, 15
<i>NLRB v. Pincus Brothers, Inc.-Mazwell</i> , 620 F.2d 367	15

IV

Cases—Continued

	Page
<i>NLRB v. Strong</i> , 393 U.S. 357	10
<i>NLRB v. Transportation Management Corp.</i> , No. 82-168 (June 15, 1983)	9
<i>Pioneer Finishing Corp. v. NLRB</i> , 667 F.2d 199, cert. denied, No. 81-2162 (Apr. 18, 1983)	12
<i>Raytheon Co.</i> , 140 N.L.R.B. 883, enforcement denied on other grounds, 326 F.2d 471	11
<i>Spielberg Manufacturing Co.</i> , 112 N.L.R.B. 1080....	7, 11
<i>Suburban Motor Freight, Inc.</i> , 247 N.L.R.B. 146..11, 14, 15	
<i>United Steelworkers v. American Manufacturing Co.</i> , 363 U.S. 564	16
<i>United Steelworkers v. Enterprise Wheel & Car Corp.</i> , 363 U.S. 593	16
<i>United Steelworkers v. Warrior & Gulf Navigation Co.</i> , 363 U.S. 574	16
<i>Woelke & Romero Framing, Inc. v. NLRB</i> , 456 U.S. 645	16

Statute:

Labor Management Relations Act, 29 U.S.C. 173(d)	16
National Labor Relations Act § 1, 29 U.S.C. 151 <i>et seq.</i>	2
§ 8(a) (1), 29 U.S.C. 158(a) (1)	3, 8
§ 8(a) (3), 29 U.S.C. 158(a) (3)	3, 8
§ 8(a) (4), 29 U.S.C. 158(a) (4)	8
§ 10(a), 29 U.S.C. 160(a)	10

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OCTOBER TERM, 1983

No. 83-71

UNITED PARCEL SERVICE, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

*ON PETITION FOR A WRIT OF CERTIORARI TO THE
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**BRIEF FOR THE NATIONAL LABOR RELATIONS
BOARD IN OPPOSITION**

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A27) is reported at 706 F.2d 972. The decision and order of the National Labor Relations Board (Pet. App. A32-A76) is reported at 261 N.L.R.B. 1012.

JURISDICTION

The judgment of the court of appeals (Pet. App. A28-A31) was entered on May 17, 1983. The petition for a writ of certiorari was filed on July 15, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTE INVOLVED

Relevant provisions of the National Labor Relations Act, 29 U.S.C. 151 *et seq.*, are set forth at Pet. 2-3.

STATEMENT

1.a. Robert Bowlds worked at petitioner's Owensboro, Kentucky terminal as a feeder driver transporting packages to and from petitioner's Nashville, Tennessee terminal since 1965 (Pet. App. A39). Bowlds was active on a variety of fronts in efforts to improve working conditions at petitioner's terminals. From 1966 until his discharge, he served as a Teamsters¹ steward at the Owensboro terminal, filed scores of grievances and participated in numerous grievance hearings. In addition, since 1976 and 1977, respectively, Bowlds distributed at the Owensboro terminal literature from UPSurge, and from PROD.² Moreover, in March 1977, Bowlds initiated a class-action suit against petitioner for allegedly violating a state statute regarding rest breaks. In connection with the suit, Bowlds retained an attorney and solicited drivers to join as plaintiffs and to contribute funds for attorney's fees. Pet. App. A43, A68 n.19; C.A. App. 410-411.

On April 24, 1978, petitioner discharged Bowlds, allegedly for overextending breaks and falsifying time cards. Following a contractual grievance proceeding, petitioner was required to reduce the discharge to a

¹ During the relevant period, Teamsters Local 89, A/W International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America ("Local 89" or "the Union") represented petitioner's drivers (Pet. App. A41 n. 1).

² UPSurge is a nation-wide organization of petitioner's employees dedicated to improving working conditions. PROD is an organization of Teamsters members with the same goal (Pet. App. A42).

suspension and to reinstate Bowlds. One month later, on May 24, 1978, petitioner gave Bowlds "a final warning" for allegedly taking "excessive breaks and failing to follow [his] supervisor's instructions." Pet. App. A3; 252 N.L.R.B. 1015, 1019 (1980), enforced, 677 F.2d 421 (6th Cir. 1982). Again, pursuant to another grievance, petitioner was ordered to rescind the warning. *Ibid.* Thereafter, on August 4, 1978, petitioner discharged Bowlds for a second time, again claiming he had overextended his breaks and falsified his timecard. The Board, upheld by the Sixth Circuit, found that the May 24 warning and August 4 discharge were motivated by Bowlds' exercise of protected activity and thus violated Section 8(a)(3) and (1) of the Act, 29 U.S.C. 158(a)(3) and (1). The Board, upheld by the court of appeals, ordered petitioner to rescind the warning and reinstate Bowlds. 252 N.L.R.B. at 1019. See Pet. App. A41-A42.

While the 1978 unfair labor practice proceedings were pending before the Board, petitioner again discharged Bowlds. Contending that in July and August of 1979, it became concerned about Bowlds' late arrivals, petitioner had Bowlds followed during a run on August 27-28. Petitioner claimed that Bowlds had overextended his rest breaks on that trip by 43 minutes and falsified his timecard. It suspended him on August 28 and discharged him effective on August 31. Pet. App. A4, A47-A48; C.A. 67-70, 439-444.

On September 4, 1979, Bowlds filed a grievance under the grievance procedure of the collective bargaining agreement, denying that he had overextended his breaks or falsified his timecard and stating that he had been suspended and discharged because of his union activities and his involvement in the class ac-

tion suit. Pet. App. A6. On September 11, Bowlds' grievance was heard at a local level joint grievance meeting. Bob Jones, petitioner's division manager in charge of all feeder drivers in Kentucky, stated that Bowlds had been discharged for overextending his breaks and for falsifying his timecard on the August 27-28, 1979, shift. Jones read into the record the October 3, 1978, "final warning" to Bowlds that the Board had nullified in the earlier unfair labor practice case. *Id.* at A34 n.4.³ Teamsters Local 89 business agent, Thomas Trenaman, read into the record Bowlds' grievance of September 4, 1979, questioned company witnesses as to the details of Bowlds' alleged misconduct, and introduced documentary and testimonial evidence to show Bowlds' innocence. Apart from the brief reference in the text of the grievance to Bowlds' protected activities, no evidence was introduced on this subject and it was not otherwise considered. *Id.* at A18. The parties were deadlocked and referred Bowlds' grievance to the next step, the state level. *Id.* at A48-A49.

On October 9, 1979, at the state level joint grievance hearing, Jones repeated the proffered reasons for Bowlds' discharge and reread the October 3, 1978, "final warning." Bowlds spoke in his own defense. Apart from the reference in the text of the grievance itself, no evidence was introduced concerning Bowlds'

³ The October 3 "final warning" was part of a grievance award concerning Bowlds' discharge on August 4, 1978. In the earlier unfair labor practice proceeding (see page 3, *supra*), the Board had found the discharge unlawful. The Board refused to defer to the grievance award (see page 7 note 4, *infra*), which provided that Bowlds be reinstated without backpay and which left the "final warning" notice in effect. See 252 N.L.R.B. at 1015-1016.

protected activities. The state level panel was deadlocked. Pet. App. A49-A50.

On October 30, 1979, the Joint Area Conference heard Bowlds' grievance. Jones reiterated the charges against Bowlds and reread the October 3, 1978 "final warning." Bowlds' spoke in his own defense, but his protected activities were not discussed. This panel also was deadlocked. Pet. App. A50.

Finally, Bowlds' grievance was placed on the Joint Area Conference "Deadlocked Agenda." At a November 20, 1979, hearing, petitioner and the Union introduced evidence in support of their respective positions. Once again, Bowlds' protected activities were not discussed. The panel sustained Bowlds' discharge "[b]ased on the facts and the final warning [of October 3, 1978] * * *" (Pet. App. A50; C.A. App. 83).

b. David Perkins worked at the Company's Campbellsville, Kentucky, terminal from 1971 until he was discharged on August 30, 1979. Pet. App. A4-A6. Perkins transported packages from Campbellsville to the Nashville, Tennessee, terminal. On the return trip, he drove from Nashville to an intermediate stop at the Bowling Green, Kentucky, terminal and then returned to the Campbellsville terminal. *Id.* at A51.

Beginning in October 1976, Perkins solicited employee contributions and signatures in support of Bowlds' class action lawsuit. On April 5 and September 11, 1979, Perkins testified in support of Bowlds at the earlier unfair labor practice hearing (page 3, *supra*). On several occasions Perkins distributed UPSurge or PROD literature at the Campbellsville terminal. Pet. App. A53. Perkins was warned by Terminal Manager Mouser not to distribute such literature. *Ibid.* On September 4, 1979, Perkins filed a grievance alleging that petitioner

failed to assign him sufficient work. The grievance was resolved against him. *Id.* at A54-A56.

On February 28, 1979, Perkins asked Terminal Manager Mouser for additional trousers to complete his company-issued uniform. Mouser refused, stating: "Perkins, we're trying to figure out a way to fire your ass anyway. We won't have to get you any [trousers]." Pet. App. A5, A54.

As was the case with Bowlds, petitioner claimed that on the night shift of August 27-28, 1979, while driving between the Campbellsville and Nashville terminals, Perkins overextended his rest breaks and falsified his timecard. Petitioner suspended Perkins on August 28 and discharged him on August 30. Pet. App. A5-A6, A52-A53.

On September 4, 1979 Perkins grieved in protest of his suspension and discharge. On September 11, 1979, Perkins' grievance was heard before the local level joint grievance panel. Petitioner and the Union presented their evidence. Nothing was said about Perkins' protected activities. The hearing was deadlocked, and Perkins' grievance was referred to the state local joint grievance panel. Pet. App. A54-A55.

On October 9, 1979, at the state level joint grievance hearing, again no mention was made of Perkins' protected activities. The grievance panel ordered Perkins' immediate reinstatement but without back-pay. He returned to work on October 10, 1979. Pet. App. A55-A56.

2. Bowlds and Perkins filed unfair labor practice charges with the Board alleging that they were discharged for engaging in activities protected by the Act. A consolidated complaint was issued on October 24, 1979 (Pet. App. A37). In the unfair labor prac-

tice proceeding, petitioner asked the Board to defer to the grievance awards concerning Bowlds and Perkins. Upholding the decision of the administrative law judge ("ALJ"), the Board refused to defer because the grievance panels did not consider evidence relating to Bowlds' and Perkins' protected activities and, therefore, did not decide the unfair labor practice issues presented to the Board (Pet. App. A61-A62, A32-A33). As the ALJ explained⁴ (Pet. App. A62):

⁴ In the earlier unfair labor practice proceeding involving Bowlds, the Board had refused to defer to the grievance award on the same basis (Pet. App. A62 n. 12). There, the Board explained (252 N.L.R.B. at 1015-1016; footnote omitted):

Douglas Borders, the Union's business representative who represented Bowlds at the arbitration, testified at the unfair labor practice hearing that the grievance was pursued on a contractual basis and that he was unaware, and so did not urge, that Bowlds' activities on behalf of PROD and UPSurge had caused his discharge.

Because of the Union's failure both to advocate Bowlds' claim that he was discharged for dissident activities and to present evidence on that claim, we find deferral inappropriate. In these circumstances, it is not enough that Bowlds' grievance was read at each step of the proceeding, even though in the grievance Bowlds contended that he was discharged for his "union activities and involvement in a class action suit . . ." The mere presentation of the contention, without more, cannot support deferral.

In upholding the Board's decision, the court of appeals stated that "under the particular circumstances of this case the Board did not depart from the standards of its decision in *Spielberg Manufacturing Co.*, 112 N.L.R.B. 1080 (1955), in proceeding to hear Bowlds' grievance even though it had been the subject of arbitration proceedings under the Collective Bargaining Agreement." *NLRB v. United Parcel Service, Inc.*, 677 F.2d 421, 422 (6th Cir. 1982).

[T]he concerted activities and union activities of Perkins and Bowlds were not brought up at any of the grievance joint meetings except in making a brief mention by reading references to such as part of the grievance language. Moreover, Union Agent Trenaman admitted that he never met with Bowlds or Perkins before the grievance joint panel meetings during the various steps of the grievance procedure, never went over their testimony with them, never introduced any evidence concerning their PROD or UPSurge activities, their class action lawsuit (other than a reference to it in Bowlds' grievance), nor the fact that they had filed grievances under the grievance procedure, nor that they had testified in the earlier Board case * * *. In the final analysis, the joint grievance committees and panels here involved did not consider the relevant facts pertaining to union and concerted activities of Bowlds and Perkins [and], in fact, were barely made aware of them.

On the merits, the Board found that Bowlds and Perkins had been discharged because of their protected activities in violation of Section 8(a)(1), (3) and (4) of the Act, 29 U.S.C. 158(a)(1), (3) and (4). In so finding, the Board rejected petitioner's contention that the two employees had overextended their rest periods and falsified their time cards. Pet. App. A66-A73.⁵

⁵ The Board also found that petitioner violated Section 8(a)(1) of the Act, 29 U.S.C. 158(a)(1), by maintaining and enforcing a rule that prohibited distribution of UPSurge literature by employees during nonworking time (Pet. App. A64). The court of appeals (Judge Rosenn dissenting) upheld this finding (Pet. App. A14) and no issue concerning it is raised in the petition.

3. The court of appeals agreed that the Board had properly refused to defer to the grievance awards.⁶ It noted that "no evidence of Bowlds' and Perkins' protected activities was presented at any stage of the grievance proceedings," and "[t]he panel decisions made no reference to any concerted or protected activities on the part of Bowlds or Perkins" (Pet. App. A18). The court explained that (Pet. App. A19; footnotes omitted):

We have previously held that "for the Board's deferral policy not to be one of abdication, the Board must be presented with some evidence that the statutory issue has actually been decided." [*NLRB v. General Warehouse [Corp.]*, 643 F.2d [965, 969 (3d Cir. 1981)] (footnotes omitted)]. The instant record is devoid of any such

⁶ However, the court did not enforce the Board's order. The court found that the General Counsel had presented sufficient evidence to support the inference that protected conduct was a motivating factor in petitioner's decision to discharge the two employees. But, relying on *Behring International, Inc. v. NLRB*, 675 F.2d 83, 88, 90 (3d Cir. 1982), vacated and remanded, No. 82-438 (June 20, 1983), enforced after remand, 714 F.2d 291 (3d Cir. 1983), and *NLRB v. Blackstone Co.*, 685 F.2d 102, 104-106 (3d Cir. 1982), vacated and remanded, No. 82-1105 (June 20, 1983), enforced after remand, No. 81-3132 (3d Cir. Sept. 7, 1983), the court concluded that the Board had "misallocated the burden of persuasion" by "shift[ing] to UPS the burden of proving that the discharges would have taken place in the absence of any protected conduct." Accordingly, the court remanded the case to the Board for application of the test enunciated by it in *Behring* and *Blackstone* (Pet. App. A23.) On September 16, 1983, the Board filed a petition for a writ of certiorari (No. 83-453) requesting that this aspect of the court's judgment be vacated and that the case be remanded to the Third Circuit for reconsideration in light of *NLRB v. Transportation Management Corp.*, No. 82-168 (June 15, 1983).

evidence. There is nothing to indicate that the statutory issue was fully presented to or considered by the grievance panels. Based on that record, the Board did not abuse its discretion by refusing to defer.

ARGUMENT

1. Section 10(a) of the Act, 29 U.S.C. 160(a), expressly provides that the Board's authority to prevent persons from engaging in unfair labor practices is not "affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise." See *NLRB v. Acme Industrial Co.*, 385 U.S. 432, 436-437 (1967). Although the Board may in its discretion elect to defer to arbitral processes, it is not compelled to do so when an unfair labor practice has been committed. See *NLRB v. Strong*, 393 U.S. 357, 360-362 (1969). When the Board does assert jurisdiction, its unfair labor practice decision take precedence over arbitral awards that enforce private contract rights. As the Court stated in *Carey v. Westinghouse Electric Corp.*, 375 U.S. 261, 271-272 (1964):

There is no question that the Board is not precluded from adjudicating unfair labor practice charges even though they might have been the subject of an arbitration proceeding and award. Section 10(a) of the Act expressly makes this plain, and the courts have uniformly so held. However, it is equally well established that the Board has considerable discretion to respect an arbitration award and decline to exercise its authority over alleged unfair labor practices if to do so will serve the fundamental aims of the Act. * * * Should the Board disagree with the arbiter * * * the Board's ruling would, of course, take precedence * * *.

Accord, *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 50 (1974).

The Board, in its discretion, has established a policy of deferring to an arbitral decision only if (1) the arbitrator's decision is not clearly repugnant to the purposes and policies of the Act; (2) the arbitration procedures are fair and regular; (3) the parties have previously agreed to be bound by the arbitrator's decision; and (4) the arbitrator has considered and decided the unfair labor practice issue presented to the Board. *Spielberg Manufacturing Co.*, 112 N.L.R.B. 1080, 1082 (1955); *Raytheon Co.*, 140 N.L.R.B. 883, 884-885 (1963), enforcement denied on other grounds, 326 F.2d 471 (1st Cir. 1964); *Suburban Motor Freight, Inc.*, 247 N.L.R.B. 146, 146-147 (1980).

In this case, petitioner contends (Pet. 9) that the Board erred in concluding that the grievance proceedings had not considered or resolved the statutory issue whether Bowlds and Perkins had been discriminated against for engaging in concerted activities protected by Section 7 of the Act. In the circumstances here presented, this issue does not warrant review by this Court.

2. As shown, pages 4-5, *supra*, between September 11 and November 20, 1979, the Union processed Bowlds' claim through four stages of the grievance procedure. At each step, the Union read into the record Bowlds' grievance, which denied that he had overextended his breaks or falsified his timecard and which alleged that he had been disciplined because of his union and other protected activities. However, the Union did not introduce any evidence regarding Bowlds' protected activities, their extent, or their relationship to the disciplinary action. Perkins' grievance also denied that he had overextended his breaks.

It made no mention, however, of his protected activities. And during the grievance proceedings, nothing was said about Perkins' protected activities. On these facts, the Board was warranted in concluding that "the joint grievance committees and panels here involved did not consider the relevant facts pertaining to union and concerted activities of Bowlds and Perkins [and] in fact, were barely made aware of them" (Pet. App. A62).

Petitioner principally relies (Pet. 9) on the fact that Bowlds' and Perkins' discharges were considered under a collective bargaining agreement that prohibited anti-union discrimination and the fact that Bowlds' grievance alleged such discrimination. On this basis, petitioner contends that the arbitral decision was entitled to deference. As the court below noted in rejecting this argument (Pet. App. A20 n.23; emphasis in original) :

When *no* evidence of protected activity is presented to the arbitrator and the arbitrator's decision makes *no* mention of statutory protected rights, we find it difficult to conclude "that the arbitrator consider[ed] the statutory issue and rule[d] on it or all the facts required to decide it." [*NLRB v. General Warehouse*, 643 F.2d [965,] 969 & n.17 [3d Cir. 1981].

Accord: *Pioneer Finishing Corp. v. NLRB*, 667 F.2d 199, 202-203 (1st Cir. 1981), cert. denied, No. 81-2162 (Apr. 18, 1983) ("Where the arbitrator has no duty to consider the statutory issues, it would undermine the purpose of the Act to require the Board to defer merely on the speculation that he must have considered an employee's rights under the statute"); *NLRB v. Magnetics International, Inc.*, 699 F.2d 806, 811 (6th Cir. 1983) ("We will not speculate about

what the arbitrator must necessarily have considered. * * * [A]ny doubts regarding the propriety of deferral will be resolved against the party urging deferral"); *NLRB v. General Warehouse Corp.*, 643 F.2d at 969 ("in order for the Board's deferral policy not to be one of abdication, the Board must be presented with some evidence that the statutory issue has actually been decided"); *NLRB v. Al Bryant, Inc.*, 711 F.2d 543, 550 (3d Cir. 1983), petition for cert. pending, No. 83-446 ("The requirement that the statutory issues have been presented to and decided by the arbitrator is of particular significance to insure that the Board does not abdicate its responsibility to protect statutory rights").

NLRB v. Motor Convoy, Inc., 673 F.2d 734 (4th Cir. 1982), relied on by petitioner (Pet. 9-10), is factually distinguishable from the situation here. There, in finding that the grievance proceeding met the Board's deferral standards, the court noted (673 F.2d at 736) that "[the grievant] was given every opportunity to speak, offer witnesses and evidence, and present arguments in his favor. At the conclusion of the hearing, he stated on the record that he had been represented fairly and had received a fair hearing."⁷

Here, by contrast, as the court below noted (Pet. App. A18; footnote omitted, and see Pet. App. A63), "the Local 89 Business Agent who represented both

⁷ The court in *Motor Convoy* "recognize[d] that the resolution of contractual 'just cause' issues is not alone sufficient to resolve statutory unfair labor practice charges" (673 F.2d at 736). Even where just cause for discharge exists, if the discharge was motivated in part by unlawful consideration, it constitutes a violation of the Act unless the employer can prove that it would have occurred even absent the unlawful considerations. *NLRB v. Transportation Management, supra*.

employees before the grievance panel, admitted that he never met with Bowlds or Perkins before the grievance panel meetings, never went over their testimony with them, and never introduced any evidence concerning their PROD or UPSurge activities. Other than a passing reference in Bowlds' grievance, no mention was made before the panel of the class action lawsuit against UPS, of the other grievances filed by Bowlds or Perkins, or of their previous testimony before the Board. The panel decisions made no reference to any concerted or protected activities on the part of Bowlds or Perkins." ⁸

3. Contrary to petitioner's contention (Pet. 11-13), the fact that the Board has changed the manner in which it applies the fourth deferral criterion—whether the arbitrator has considered and disposed of the unfair labor practice issue—does not afford a basis for review by this Court.

In determining the appropriate standard for deferral, the Board must weigh "the statutory purpose of encouraging collective-bargaining relationships * * * [against] the equally important purpose of protecting employees in the exercise of their rights under Section 7 of the Act." *Suburban Motor Freight, Inc.*, 247 N.L.R.B. 146 (1980). In *Suburban Motor Freight*, the Board concluded that experience had shown that its previous policy, enunciated in *Electronic Reproduction Service Corp.*, 213 N.L.R.B. 758

⁸ As noted above, page 7 note 4, *supra*, the Board, upheld by the Sixth Circuit, also refused to defer to the grievance award concerning Bowlds' discharge in the earlier unfair labor practice proceeding, noting the failure of the union agent representing Bowlds to advocate and present evidence on Bowlds' claim that he was discharged for dissident activities.

(1974),⁹ gave undue weight to the former purpose in derogation of the protection of Section 7 rights. Accordingly, the Board returned to its pre-*Electronic Reproduction* policy of deferring to arbitration awards only when there is an indication that "the arbitrator ruled on the statutory issue of discrimination in determining the propriety of an employer's disciplinary actions," and of imposing "on the party seeking Board deferral to an arbitration award the burden to prove that the issue of discrimination was litigated before the arbitrator" (247 N.L.R.B. at 147).

Whether or not the Board elects to defer to grievance awards, and, on what terms, are matters committed to the Board's discretion. See *Carey v. Westinghouse Electric Corp.*, 375 U.S. at 272. While the Board must apply its established criteria uniformly, it is free to change those criteria, if, in its judgment, to do so would further the policies of the Act. See, e.g., *NLRB v. Motor Convoy, Inc.*, 673 F.2d at 736; *Liquor Salesmen's Union Local 2 v. NLRB*, 664 F.2d 318, 326 (2d Cir. 1981); *NLRB v. Magnetics International, Inc.*, 699 F.2d at 811 n.2; *NLRB v. Pincus Brothers, Inc.-Maxwell*, 620 F.2d 367, 372 n.8 (3d Cir. 1980).

⁹ In *Electronic Reproduction*, 213 N.L.R.B. at 762, the Board concluded that it would "give full effect to arbitration awards dealing with discipline or discharge cases, under *Spielberg*, except when unusual circumstances are shown which demonstrate that there were bona fide reasons, other than a mere desire on the part of one party to try the same facts before two forums, which caused the failure to introduce * * * evidence [that the discharge or discipline constituted an unfair labor practice] at the arbitration proceeding."

Section 203(d) of the Labor Management Relations Act, 29 U.S.C. 173(d)¹⁰ and this Court's decisions in the *Steelworkers* trilogy¹¹ do not require a contrary conclusion (see Pet. 13-16). The *Steelworkers* trilogy "dealt with the relationship of courts to arbitrators when an arbitration award is under review," while the "relationship of the Board to the arbitration process is of a quite different order." *NLRB v. Acme Industrial Co.*, 385 U.S. at 436. Accordingly, the Court concluded, "[t]he weighing of the arbitrator's greater institutional competency, which was so vital to those decisions," has no application to the question of Board deferral to the arbitration process. *Ibid.* See also *Carey v. Westinghouse Electric Corp.*, 375 U.S. at 272.¹²

¹⁰ 29 U.S.C. 173(d) provides:

Final adjustment by a method agreed upon by the parties is declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective-bargaining agreement.

¹¹ *United Steelworkers v. American Manufacturing Co.*, 363 U.S. 564, 566 (1960); *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 581 (1960); *United Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 597-598 (1960).

¹² Petitioner's contention (Pet. 16-19) that, even where deferral is not appropriate, "basic principles of collateral estoppel demand deferral to factual determinations actually made by a panel" is not properly raised on this record. Petitioner did not raise that contention before either the Board or the court of appeals. It therefore may not be raised here. *Woelke & Romero Framing, Inc. v. NLRB*, 456 U.S. 645, 665-666 (1982); *Detroit Edison Co. v. NLRB*, 440 U.S. 301, 311-312 n.10 (1979); *Adickes v. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970).

In any event, the application of collateral estoppel principles would be inappropriate in view of the different nature

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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OCTOBER 1983

of Board and arbitral proceedings and the exclusive jurisdiction conferred on the Board by Section 10 (a) of the Act (page 10, *supra*).